BEFORE THE KANSAS WORKERS COMPENSATION APPEALS BOARD

RANDALL W. FOSTER	)	
Claimant	)	
V.	)	
	)	
RYLIE EQUIPMENT	)	
& CONTRACTING CO.	)	Docket No. 1,070,261
Respondent	)	
AND	)	
	)	
TRAVELERS PROPERTY CASUALTY	)	
COMPANY OF AMERICA	)	
Insurance Carrier	)	

ORDER

Claimant, through John J. Bryan, requested review of Administrative Law Judge Kenneth J. Hursh's August 4, 2016 preliminary hearing Order. Ronald A. Prichard appeared for respondent and insurance carrier (respondent).

The record on appeal is the same considered by the judge and consists of the September 8, 2014 preliminary hearing transcript and exhibits thereto, the November 17, 2014 preliminary hearing transcript, the March 11, 2015 preliminary hearing transcript and exhibits thereto, and the August 3, 2016 preliminary hearing transcript and exhibits thereto, in addition to all pleadings contained in the administrative file.

ISSUE

Claimant was injured on March 26, 2014. The judge found claimant failed to prove his right shoulder injury arose out of and in the course of his employment.

Claimant argues he met his burden of proof. Claimant asserts his testimony and Dr. Satterlee's opinion are uncontradicted that his right shoulder injury arose out of and in the course of his employment. Respondent maintains the Order should be affirmed.

The issue is: did claimant's right shoulder injury arise out of and in the course of his employment?[1]

[1] Additional references to claimant's shoulder relate to his right shoulder only.

FINDINGS OF FACT

Claimant is currently 43 years-old and right-hand dominant. He began working for respondent in 2012 as an equipment operator. On March 26, 2014, claimant sustained an electrical shock while using a shovel that touched two 220-volt streetlight wires.

Claimant was initially treated at an urgent care facility and later referred to J. Clinton Walker, M.D. On May 27, 2014, Dr. Walker performed surgery on claimant's right hand for carpal tunnel syndrome (CTS). None of the limited records in evidence from Dr. Walker mention that claimant sustained a shoulder injury.

James R. Eyman, Ph.D., a psychologist, evaluated claimant on August 6, 2014, in connection with psychological symptoms he developed after the injury by accident. While the focus of the evaluation was claimant's mental health, Dr. Eyman noted claimant had difficulty using his right thumb and forefinger and had right hand and forearm pain.

A September 8, 2014 preliminary hearing concerned claimant's request for psychological treatment. At such hearing, claimant testified about injuring his right hand, but not about a shoulder injury.

After undergoing physical therapy, claimant was released by Dr. Walker on November 4, 2014, with permanent restrictions of no lifting above 20 pounds at waist level and 10 pounds at shoulder level. Claimant testified he was always on light duty after his accident, but he really could not lift anything.

Following a November 17, 2014 preliminary hearing, the judge issued an order memorializing the parties' agreement that respondent would authorize Terrence Pratt, M.D., to provide claimant additional treatment for the injury by accident as the doctor deemed necessary.

On December 4, 2014, an EMG was performed. The clinical history noted claimant had shoulder and neck pain radiating down his right side, stopping at his hip area, and muscle spasms with numbness and weakness on his right side since the work accident. The EMG showed median neuropathy of claimant's wrists, moderate on the left and mild on the right, and no significant right cervical radiculopathy or brachial plexopathy. Dr. Pratt suggested evaluation with a neurologist.

On December 5, 2014, claimant saw Dr. Pratt for what the doctor termed "right upper extremity involvement."[2] The doctor described claimant complaining of "a cramping frequently axillary area on the right and symptoms from the hip and proximal on the right

[2] P.H. Trans. (Aug. 3, 2016), Cl. Ex. 4 at 6.

side of his body."[3] Claimant also had right hand numbness in his thumb and middle fingers with weakness of his right upper extremity. Claimant reported some cervical symptoms that radiated bilaterally to his upper back. He reported that Lyrica helped with his nerve-type pain, while work activities aggravated his symptoms.

Dr. Pratt performed a physical examination which revealed tenderness in claimant's right cervical and upper parascapular area with decreased cervical range of motion. Claimant had right upper extremity giveaway weakness and sensory loss in his right distal forearm to hand. Dr. Pratt reviewed claimant's medical records and noted:

> On November 6, 2014, documentation from Dr. Walker noted right upper extremity involvement but did note spasms and charley horse like feeling, starting in the shoulder and shooting sometimes into his wrists, abdomen, and spine. His whole arm would draw up close to his body. He was noted to reach maximum medical improvement and had a 20-pound lifting limitation. The electrodiagnostic study on the right upper extremity only revealed findings suggestive of carpal tunnel syndrome on the right with severe involvement and the initial documentation from US Healthworks noted an electric shock to his right hand and forearm.[4]

Dr. Pratt could not conclude claimant's CTS related to the work event, he could not state claimant's symptoms were due to peripheral nerve entrapment, he could not explain claimant's right upper extremity giveaway weakness or right upper extremity and right-sided body cramping sensations and found no documentation claimant's cervical region was acutely or directly involved in the work event. The doctor recommended claimant continue taking Lyrica and be evaluated by a neurologist for his cramping.

Following a March 11, 2015 preliminary hearing, the judge ordered respondent to provide claimant with the services of a neurological specialist to be named by Dr. Pratt. Dr. Pratt suggested either Dr. Dubinsky or Dr. Applebaum.

Claimant's last day worked for respondent was February 4, 2016. Claimant testified he went to bed on his couch that day and awoke with severe pain in a seated position on February 5, 2016. He was unable to move his arm and felt like "steel rods" ran through his shoulder.[5] Claimant testified the pain was different from any pain he had felt before. Claimant went to an emergency room.[6] Because of his shoulder pain and inability to move his shoulder, claimant never returned to work for respondent.

---

[3] *Id.*, Cl. Ex. 4 at 6.

[4] *Id.*, Cl. Ex. 4 at 8. Dr. Walker's report is not in evidence.

[5] *Id.* at 12.

[6] The ER records are not in evidence.

On February 9, 2016, claimant saw Amber L. Wells, PA-C. Claimant complained of shoulder pain for over one week, having awoke on February 5 with sharp and stabbing shoulder pain. He described the pain as feeling like a knife was stabbing his shoulder joint. Claimant denied any specific incident of injury or trauma to his shoulder, but noted his pain was worsened by above-shoulder movement, in addition to wearing a sling and not using his shoulder. Ms. Wells performed a physical examination which revealed some tenderness to palpation over claimant's anterior shoulder with limited range of motion and decreased strength. Ms. Wells was able to hear a palpable pop or catching sensation in claimant's shoulder. Ms. Wells diagnosed claimant with shoulder adhesive capsulitis. She administered a Kenalog injection in claimant's shoulder and recommended rest, ice, compression and elevation as needed, over-the-counter analgesics for pain and physical therapy. That same day, Shaun Steeby, M.D., an orthopedic surgeon, evaluated claimant and agreed with the plan of care. Dr. Steeby restricted claimant against lifting, pulling or pushing more than 20 pounds with his right arm.

A physical therapist, Patrick Pfannenstiel, indicated in a February 15, 2016 report that claimant started having shoulder pain on February 5, 2016. Claimant denied injury, but reported issues with his entire right upper extremity since his 2014 accident. The therapist assumed claimant had pronounced right upper extremity weakness from the 2014 accident and such weakness caused claimant to have poor movement and mechanics of his shoulder.

Therapist Pfannenstiel noted on March 21, 2016, that claimant reported having continuous pain in his shoulder since the time of his March 2014 accident. The therapist stated:

> I do feel that patient symptoms are somehow related to his weakness that he had in the right shoulder from his electrocution accident back in 2014. He has learned to compensate with movement of the right arm which in turn causes increased bad mechanics of the right shoulder motion. He has full ROM so I do not feel he has adhesive capsulitis but some other type of inflammation of the right shoulder.[7]

On March 23, 2016, claimant returned to Dr. Steeby for his shoulder adhesive capsulitis and shoulder pain with impingement. Claimant reported that his injury by accident affected the way he does things with his right arm, as well as his grip and his back, which caused him to modify how he used his arm, which may have been exacerbating his shoulder problem. Claimant reported little improvement, if any. Dr. Steeby stated, "Because of his accident in 2014 some of this [sic] restrictions make it very difficult for him to perform his activities of daily living without having a good shoulder so this new pain is very problematic for him."[8]

---

[7] *Id.*, Cl. Ex. 10 at 16.

[8] *Id.*, Cl. Ex. 10 at 4.

Claimant also saw James Appelbaum, M.D., a neurologist, on March 23, 2016. The doctor noted intermittent spasms from the base of claimant's skull to his abdomen with flexion of his right arm. Dr. Appelbaum's physical examination revealed claimant had slight right arm weakness and sensory loss in his right forearm and a spot above the right scapula. The doctor found no evidence of spasticity as had been observed by other examiners. The doctor diagnosed claimant with an electrical accident. Dr. Appelbaum indicated claimant had right arm give-way weakness that was inconsistent with organic neurological disease. Dr. Appelbaum recommended MRIs of claimant's brain and thoracic spine, in addition to an electroencephalogram, to rule out intracranial damage, thoracic spine injury or seizure disorder.

On April 5, 2016, a right upper extremity MRI was performed which was read as showing, among other things, a tiny tear of claimant's infraspinatus tendon, with questionable tiny tear of the distal infraspinatus tendon, infraspinatus tendinopathy and minimal supraspinatus tendinopathy.

On May 5, 2016, on referral from Dr. Steeby, claimant saw Brian Wilson, M.D., apparently another orthopedic physician, for shoulder pain. The history of present illness stated claimant had shoulder pain that began on February 5, 2016, without antecedent trauma or inciting event. However, claimant also gave a history of weakness and discomfort in his shoulder since March 26, 2014, with a sharp, stabbing, aching pain since February with no trauma. Dr. Wilson's physical examination of claimant's shoulder revealed decreased range of motion with slight right arm weakness. On review of the MRI and x-rays, Dr. Wilson noted claimant did not have a rotator cuff tear and no specific SLAP injury. Dr. Wilson diagnosed claimant with shoulder impingement. The doctor administered a Kenalog injection, recommended continued physical therapy and put claimant on a 10 pound lifting restriction.

On June 13, 2016, claimant saw Craig Satterlee, MD., an orthopedic physician. Claimant complained of shoulder pain, decreased range of motion and strength. Claimant told Dr. Satterlee he had a shoulder injection about one month earlier that provided temporary relief only. The doctor reviewed x-rays which showed marked acromion impingement and an MRI which revealed a superior supraspinatus rotator cuff tear, a small infraspinatus tear and a questionable rim rent tear of the distal infraspinatus. The doctor noted claimant's history of having hurt his shoulder, being unable to find a comfortable position in the emergency room and having a very painful shoulder. Dr. Satterlee recommended an MRI arthrogram. While noting other physicians' diagnoses, Dr. Satterlee indicated claimant had "troubles with his right shoulder."[9]

[9] *Id.*, Cl. Ex. 3 at 3.

According to claimant, Dr. Satterlee intends to do a rotator cuff repair after the arthrogram. Claimant testified regarding what Dr. Satterlee told him about the possible cause of his shoulder problems:

> Well, Satterlee seems to think that during - - when the accident happened, my partner, Joe, said when it exploded - - the power exploded, it stood me straight up in the air, and he said it just threw my arm back. And Dr. Satterlee said a lot of times with electricity, when it's an involuntary movement, when electricity is in your muscles like that, it makes your muscles tense, and an involuntary movement can even break bones.[10]

Claimant testified his shoulder noticeably sags when looking in the mirror. Claimant testified he has had a lot of pain since his injury by accident.

In the currently-appealed August 4, 2016 Order, the judge stated:

> There was little in the record, either at this hearing or previous hearings, to show a particular injury to the right shoulder. The claimant had generalized complaints involving the right side of his body and right upper extremity. On December 18, 2014, Dr. Pratt noted the claimant having cervical involvement and a "Charley horse" sensation in the right shoulder. Records from Stormont-Vail hospital, from December 4, 2014, reported the claimant having right shoulder and neck pain. An EMG performed at that time revealed carpal tunnel syndrome, but no significant right cervical radiculopathy. No medical providers diagnosed or recommended treatment or diagnostic tests for a right shoulder injury prior to February 5, 2016.
>
> The almost two year time lapse between the work accident and the sudden onset of shoulder pain tended to show the two events were not causally related, especially with little evidence of ongoing shoulder symptoms between the accident date and 2016's sudden onset. Plus, the record lacked explanation from medical experts how the recent onset of shoulder pain and the work accident were linked. The record failed to prove by a preponderance of evidence the claimant's right rotator cuff injuries arose from the March [26], 201[4] work accident. The claimant's request for medical benefits for the right shoulder is therefore denied.
>
> The claimant has been off work since February 5, 2016 due to the right shoulder problem. Since the right shoulder is not an injury related to the work accident, his request for temporary total benefits is also denied. The claimant's requests for payment of out of pocket prescription expenses and medical mileage also were due to the unrelated right shoulder problem and are also denied.
>
> The respondent and insurance carrier shall provide the claimant additional medical treatment for work related injuries as directed by Dr. Appelbaum.

---

[10] *Id.* at 14.

PRINCIPLES OF LAW

An employer is liable to pay compensation to an employee incurring personal injury by accident arising out of and in the course of employment.[11] Claimant must prove the right to an award based on the whole record under a "more probably true than not true" standard.[12]

K.S.A. 2013 Supp. 44-508 states in part:

> (f)(2) An injury is compensable only if it arises out of and in the course of employment. An injury is not compensable because work was a triggering or precipitating factor. An injury is not compensable solely because it aggravates, accelerates or exacerbates a preexisting condition or renders a preexisting condition symptomatic.
>
> . . .
>
> (B) An injury by accident shall be deemed to arise out of employment only if:
>
> (i) There is a causal connection between the conditions under which the work is required to be performed and the resulting accident; and
>
> (ii) the accident is the prevailing factor causing the injury, medical condition, and resulting disability or impairment.
>
> . . .
>
> (g) "Prevailing" as it relates to the term "factor" means the primary factor, in relation to any other factor. In determining what constitutes the "prevailing factor" in a given case, the administrative law judge shall consider all relevant evidence submitted by the parties.

ANALYSIS

Claimant has the burden to establish compensability. There is some reference to claimant having a "charley horse like feeling" in his shoulder, at least based on Dr. Pratt's review of a November 6, 2014 report from Dr. Walker, and there are other indications of shoulder area symptoms, such as the history in the December 4, 2014 EMG record. Claimant, at least in the medical records, indicated he had some degree of shoulder pain dating back to his accident. However, the evidence does not sufficiently establish causation.

---

[11] K.S.A. 2013 Supp. 44-501b(b).

[12] K.S.A. 2013 Supp. 44-501b(c) & K.S.A. 2013 Supp. 44-508(h).

This Board Member agrees with the judge's analysis. There is little evidence establishing claimant hurt his shoulder in the March 26, 2014 injury by accident or that his current shoulder symptoms are the direct and natural result of his injury by accident. To the contrary, claimant went nearly two years without any apparent shoulder treatment or diagnostic testing. During such time frame, claimant was able to work within restrictions. Seemingly abruptly, on February 5, 2016, claimant woke up with severe shoulder pain and the inability to move his shoulder and he has not worked thereafter.

Dr. Satterlee's opinion is not uncontradicted and not very helpful with respect to causation. This Board Member does not think it is terribly necessary for Dr. Satterlee to provide a specific shoulder diagnosis, but Dr. Satterlee never provided a causation opinion linking claimant's current shoulder complaints with his 2014 injury by accident.

Claimant's recitation of what Dr. Satterlee told him about possible causes of his shoulder problems does not meet the more probable than not standard of proof. It appears Dr. Satterlee only told claimant about a potential or possible cause of his complaints, not a probable or likely cause. This Board Member agrees with the judge that the record lacks sufficient medical explanation linking the February 5, 2016 onset of shoulder pain with the March 26, 2014 injury by accident.

Based on the current record, claimant's burden of proof is not satisfied. While a physical therapist theorizes claimant's claimant's current symptoms are "somehow" related to the accident because the initial injury caused claimant weakness which altered his shoulder movements and mechanics, this Board Member is reluctant to elevate such concept above the opinions of the various physicians involved in this case, none of whom provided a causation opinion linking claimant's shoulder injury with the accident. While there may be an explanation, based on the more probable than not standard, showing a connection between claimant's injury by accident and his current symptoms, such necessary proof is not in evidence.

CONCLUSIONS

Claimant did not prove his shoulder symptoms arose out of and in the course of his injury by accident.

WHEREFORE, this Board Member affirms the August 4, 2016 Order.[13]

[13] By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim. Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2015 Supp. 44-551(l)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

IT IS SO ORDERED.

Dated this _____ day of October, 2016.

_____
HONORABLE JOHN F. CARPINELLI
BOARD MEMBER

ec: John J. Bryan
JJBRYAN7@aol.com
janet@ksjustice.com

Ronald A. Prichard
RPrichar@travelers.com
dmfisher@travelers.com

Honorable Kenneth J. Hursh